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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 634

BERNICE SHEPTUR,
Petitioner,

vs.

THE PROCTER & GAMBLE DISTRIBUTING CO.,
an Ohio Corporation,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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(The numbers in parentheses herein refer to pages in the certified record, said certified record consisting of, among other things, the appendices filed in the Circuit Court of Appeals by appellant and appellee. Those numbers with the suffix "a" refer to appellant's appendix below and those numbers with the suffix "b" refer to appellee's appendix below.)

Morton A. Eden, on behalf of Bernice Sheptur, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on November 28, 1958.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Michigan, Southern Division, is unreported but appears at pages 105a and 106a of the certified record on appeal.

The opinion of the Court of Appeals from the Sixth Circuit is at this writing unpublished and West Publishing Company has as yet not determined its pagination. A copy of said opinion appears in the certified record and another is appended hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on November 28, 1958 and a copy thereof is appended to this petition in the appendix at page 18.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

In an action for personal injuries where jurisdiction is based upon diversity of citizenship, plaintiff alleged that she contracted dermatitis as a result of using a detergent called "Tide," defendant's product. Her action was based upon the respondent's duty to warn of dangers connected with the use of "Tide" and upon false advertising of "Tide". On the issue of causation, petitioner presented (1) the testimony of a dermatologist that "Tide" could have caused her dermatitis; (2) her own testimony, without objection, that "Tide" did cause her condition; and (3) evidence that,

while using "Tide," she contracted dermatitis. After ceasing such use and while under medical care, her condition cleared up and she returned to the use of other soaps without difficulty. But on the first re-use of "Tide," she had a recurrence.

At the close of petitioner's case, the District Court directed a verdict for respondent, on the basis that there was no showing that "Tide" caused plaintiff's condition.

The Circuit Court of Appeals for the sixth Circuit holding that, upon this question of the sufficiency of the evidence, Michigan law was controlling and that, upon searching the record, that Court found inferences of two other possible causes which the Court found equal to that cause contended for by petitioner affirmed the directed verdict.

The questions presented are:

(1) Whether in a civil action, where jurisdiction is based upon diversity of citizenship, state law rather than federal law controls in determining the sufficiency of the evidence to present a question of fact for the jury on the issue of causation.

(2) Whether a District Judge or Court of Appeals may search the record for inferences equal to that of plaintiff and, upon finding of same, direct a verdict for the defendant.

(3) Whether a fact issue must be submitted to a jury if there is competent evidence to support a finding for plaintiff.

(4) Whether testimony by the plaintiff on the issue of causation in a civil action for personal injury admitted without objection by the defendant is entitled to probative value.

(5) Whether in a jury trial the District Judge must view the evidence in the light most favorable to plaintiff and, if, upon such view, there is competent evidence to support a finding of fact for plaintiff, submit such issue to the jury.

(6) Whether a District Judge ruling on a motion for a directed verdict must give probative value to the testimony of the medical expert that "Tide" could cause plaintiff's dermatitis when such testimony is admissible under the rules of evidence of the State of Michigan in which the District Court sat and the cause of action arose.

STATUTES INVOLVED

The 7th Amendment of the Constitution of the United States and Rule 43 (a) of the Federal Rules of Civil Procedure, 1948 Michigan Compiled Laws, Sec. 750.33, being Michigan Public Acts of 1948, No. 340. Set forth in full in the appendix at p. 23.

STATEMENT

This action is one for personal injuries wherein plaintiff alleged that as a result of use by her of "Tide" she contracted a severe dermatitis. Jurisdiction was based upon diversity of citizenship and the amount involved in that the petitioner is a citizen of the State of Michigan, the defendant is an Ohio corporation and the amount involved was in excess of $3,000.00 when the Complaint was filed on February 20, 1955 (2a, 8a). The Complaint was based upon two grounds: (1) that defendant falsely advertised "Tide" as "kind to hands", "now milder than ever" when such was untrue; and (2) the defendant was negligent in failing to

warn that 'Tide'' was harmful to the skin of some persons (4a, 5a).

The evidence at trial disclosed that plaintiff was 55 years of age, the mother of six children, and had been a housewife for approximately 35 years until 1950 (34a, 35a, 36a). Up to 1950 the plaintiff had done laundry and dishwashing as a housewife, using numerous soaps and detergents such as Rinso, Duz, Oxydol, Ivory, Silver Dust, Lifebuoy, etc., without any rash, skin condition or other difficulty (35a). From 1950 to April 1952, plaintiff operated a dishwashing machine in addition to her household duties without difficulty (36a, 51a, 55a). In operating this dishwasher, she was not required to immerse her hands in the washing fluid (35a, 36a, 37a).

Prior to April, 1952, plaintiff had never used "Tide" although she had seen and heard advertisement that it was mild to hands (38a, 55a, 56a, 63a).

In April, 1952, she obtained employment at a restaurant known as Cloverdale Farms as a dishwasher. This job required her to work eight hours a day, six days a week, washing dishes by hand. She was required to immerse her hands in a solution of warm water and "Tide" all day long (38a, 54a). When she started work, she was furnished "Tide" by her employer and noted on the box statements that "Tide" was kind to hands and mild (39a). She believed these statements at that time (68a). On this job she used nothing but "Tide" until September, 1952 (55a). During the period April through September, 1952, she developed a rash and swelling upon her hands which by September developed into a rash with pimples, exuding fluid and unbearable itching (40a, 47a). In September, still having used nothing but "Tide" on her job, her dermatitis became so bad that she had to leave her employment for medical treatment (41a). That she had a severe dermatitis

at that time was verified by a co-worker (69a), petitioner's daughter (71a), her employer (75a), Dr. Ballard (77a), and all parties conceded that plaintiff had a severe dermatitis (78a).

Under treatment by Dr. Ballard, plaintiff's condition improved to a point where she was able to return to work in early November "around election day" (44a, 75a). Upon her return to work, her employer provided her with soap other than "Tide" for the first three days and she used this without difficulty (45a, 75a). However, her employer became dissatisfied with the way other soaps cleaned the dishes and on the fourth day ordered her to return to using "Tide" (46a, 74a). Plaintiff used "Tide" one afternoon and almost immediately developed a severe dermatitis (46a). Plaintiff then was forced to leave her employment because of her condition (46a). Following this, she underwent extensive treatment and has been unemployed since (48a, 49a).

At the trial, Dr. Leo Orecklin, a specialist in dermatology, testified that he had examined plaintiff in 1953. He diagnosed her condition as dermatitis (80a, 81a). He testified that he has had frequent experience with persons who have skin trouble from detergents and classified such as sensitizing agents to which some people react by developing inflammation of the skin (82a). In response to a hypothetical question detailing plaintiff's prior use of various products and her use of "Tide" in her employment, Dr. Orecklin testified that "Tide" could have caused her condition (86a).

Plaintiff testified entirely without objection that "Tide" caused the condition upon her hands (41a); that "Tide" was no good for her hands; that she had to discontinue working because she could not use "Tide" (46a); that she had never had trouble with soap, washing powder or deter-

gents except the trouble with "Tide" (55a, 62a); and that she had no previous warning that detergents might be dangerous to her skin (61a).

In answer to interrogatories admitted in evidence, the defendant admitted that, prior to plaintiff's difficulty, defendant had notice and knowledge of complaints from persons that "Tide" had caused rash and skin eruptions or dermatitis (25a, 27a) and that four suits had been instituted against the defendant alleging that "Tide" had caused skin injury (23a, 24a). These answers were admitted in evidence (99a, 101a, 111a).

Plaintiff's Exhibits A and B (32a, 33a) establish that defendant advertised "Tide" as "kind to hands", "now milder than ever".

At the close of plaintiff's case, defendant made a motion for a directed verdict on the grounds that (1) plaintiff has not made out a *prima facie* case, (2) plaintiff has not sustained the burden of proof of false advertising, (3) plaintiff has not proved that 'Tide" injured persons other than plaintiff, (4) plaintiff has not proved defendant knew of injuries to others, and (5) defendant met all the requirements with reference to the sale of "Tide" up to and including the date of the basis of plaintiff's cause of action (103a). The District Court, Honorable Theodore Levin, granted defendant's motion for a directed verdict, resting his ruling upon the sole basis that there was no showing that "Tide" caused plaintiff's injury (104a). In doing so, he stated that the condition might have been caused by other materials. However, there was no such evidence in the record. The only evidence of causal relationship was that concerning "Tide" (106a).

The Court of Appeals for the Sixth Circuit, in a *per curiam* opinion, affirmed. In its opinion, the Circuit Court of Appeals for the Sixth Circuit held that plaintiff's testi-

mony as to causal relationship was not entitled to weight. Further, the Court held that on the question of sufficiency of the evidence, Michigan law was controlling and under Michigan law, plaintiff's inference must be legally as probable as that urged by the defendant and that since here there are two or three equally probable causes along with that urged by plaintiff, the case was properly taken from the jury. The Court stated that it is possible that the water plaintiff used caused her dermatitis or that Surf caused it. However, there was no evidence in the record of the causal connection between either water or Surf and plaintiff's condition.

It is from this judgment of the Circuit Court of Appeals for the Sixth Circuit that plaintiff seeks a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT SHOULD BE REVIEWED BECAUSE ITS HOLDING THAT STATE LAW CONTROLS THE DETERMINATION OF THE SUFFICIENCY OF THE EVIDENCE TO PRESENT A QUESTION OF FACT TO THE JURY IS IN CONFLICT WITH DECISIONS OF THE THIRD, FOURTH AND FIFTH CIRCUITS AND IS A DECISION OF AN IMPORTANT QUESTION OF FEDERAL LAW UNDER THE SEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

A directed verdict for the defendant was granted by the District Court and affirmed by the Circuit Court of Appeals solely upon the basis that the evidence was insufficient to establish that the use of "Tide" by the plaintiff caused her dermatitis. Plaintiff relied on essentially three things to

establish such causation: (1) the testimony of a dermatologist in response to a hypothetical question that "Tide" could have caused her condition, (2) clear testimony of plaintiff, admitted without any objection whatsoever, that "Tide" caused her condition and (3) an inference from the facts that she used "Tide" from April to September, 1952 and during this period developed a severe dermatitis; she then removed herself from contact with "Tide" for several weeks, obtained medical care and improved. She then returned to work and upon her return used soap other than "Tide" for three days without incident; when on the fourth day she used "Tide" for a half day, she immediately developed dermatitis again.

This testimony of Dr. Orecklin that "Tide" could have caused plaintiff's condition was not only admissible under the rules of evidence of the State of Michigan but was the only testimony permissible at that time. Testimony that "Tide" did cause her condition was not permitted. *DeGroot v. Winter*, 261 Mich. 660, 247 N. W. 69 (1933) and *Kenower v. Hotels Statler Co., Inc.*, 124 F. 2d 658 (6th Cir. 1942). Thus, being admissible under the rules of evidence of the courts of general jurisdiction of the state (Michigan) in which the trial was held, it was admissible here under Rule 43a of the Federal Rules of Civil Procedure. The District Court, of course, admitted this testimony.

The Circuit Court of Appeals for the Sixth Circuit, in affirming the judgment on the directed verdict, stated that it was equally possible that hot water or another soap product, Surf, (of which there was no evidence of use) could have caused her condition. There was no testimony whatsoever regarding causal connection between water or Surf and plaintiff's condition. There was only the bare testimony that she used warm water. The testimony of her employer that he bought a case of Surf was without any testimony that plaintiff used same.

The Circuit Court of Appeals decided specifically that Michigan law was controlling in determining the sufficiency of the evidence:

> "The rule upon which subject under Michigan Law, which is controlling here, is thus stated in *Kaminski v. Grand Trunk Western Railroad Company*, 347 Mich. 417, at 421."

The Court then went on to say:

> "The scintilla rule does not obtain in Michigan. Under Michigan law, in order to make a *prima facie* case that requires submission to the jury, plaintiff's evidence must justify inferences that its contentions are at least equally as probable as those relied upon by defendant • • •. *Here there were two or three equally probable causes to account for plaintiff's condition. The probative evidence is not selective to any one of the possible causes. Cf. Kaminski v. Grand Trunk Western Railroad Company, supra.*" (Emphasis ours.)

Thus, it is clear that the Circuit Court of Appeals has held that in a diversity of citizenship case, state law controls in determining the sufficiency of the evidence. This decision of what law controls is directly contrary to the decision of the Third, Fourth and Fifth Circuits. *Etelson v. Metropolitan Life Insurance Co.*, 137 F. 2d 62, 65 (3rd Cir. 1943); *Gorham v. Mutual Benefit Health & Accident Association*, 114 F. 2d 97, 99 (4th Cir. 1940) and *Dubuque Fire & Marine Insurance Co. v. Reynolds Co.*, 128 F. 2d 664, 666 (4th Cir. 1942) and *Reuter v. Eastern Airlines*, 226 F. 2d 443 (5th Cir. 1955). As representative of the above cited decisions, I quote from the *Gorham* Case, *supra*, page 99, as set forth:

> "Furthermore, while according great respect to the decisions of state courts in the matter of direc-

tion of verdicts, we are of the opinion that this is a matter which is governed by federal practice, and not one wherein local law or local decisions are binding. It goes to the very essence of the exercise of the judicial function by the Federal Courts."

Your petitioner, upon diligent search, is unable to discover any decision of this Honorable Court upon this important question of federal law.

Therefore, since this issue is one upon which there is a clear conflict among the Circuit Courts of Appeal and because it is an important question involving federal practice which this Court has not, but should, decide, petitioner prays that this Court grant a writ of certiorari to review this matter.

II.

THE DECISION OF THE UNITED STATES COURT OF APPEALS THAT WHERE THERE ARE TWO OR THREE EQUALLY POSSIBLE INFERENCES AND THE PROBATIVE EVIDENCE IS NOT SELECTIVE THAT A DIRECTED VERDICT SHOULD BE GRANTED HAS DECIDED A FEDERAL QUESTION IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND HAS SO FAR SANCTIONED A DEPARTURE FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEDURE AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWERS OF SUPERVISION.

Petitioner submits that it is evident from the opinion of the Circuit Court of Appeals in this cause that it combed the record to find what it felt were inferences equal to that urged by the petitioner. Petitioner further submits that the record does not support such inferences. However, assuming arguendo that there are inferences favorable to the defendant, it is not the function of the court in a trial by jury to search the record for other possible inferences. To do so, is contrary to the Seventh Amendment of the Consti-

tution of the United States. The practice employed here of searching the record for other possible inferences and then directing a verdict, if such inferences can be found and denominated equal to those contended for by plaintiff, is a practice which has been condemned by this Court in cases arising under the Federal Employer's Liability Act. Although there is no decision directly on point in diversity of citizenship cases, petitioner submits that the rule should be the same in diversity of citizenship cases since in each case is involved a question of federal practice. The Court should review this matter to correct a misconception of the function of the Court as illustrated in this case.

In *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520, this Court said:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of a particular inference or conclusion drawn by the jury. The very essense of its function is to select from among conflicting inferences and conclusions that which it considers the most reasonable • • • That conclusion whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In *Lavender v. Kern*, 327 U. S. 645, 653, 66 S. Ct. 740, 744, 90 L. Ed. 916, this Court said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever

> facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle disputes by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear."

Each of the cases from which petitioner has quoted above were cases arising under the Federal Employers' Liability Act. However, petitioner submits that the same rule should be applied in diversity of citizenship cases since in each case the question is one of whether or not a directed verdict should be granted and the question of sufficiency of the evidence is one of federal practice and not one controlled by state law. In the above quoted decisions of this Court, there is sufficient evidence to submit a question of fact to the jury, if it is supported by competent evidence. That other inferences which would relieve the defendant of liability are also possible is not grounds for directing a verdict.

Here, the Circuit Court of Appeals has, in disregard of clear decisions of this Court, which it may feel inapplicable here, searched the record for conflicting circumstantial evidence. The established fact that the very essence of the function of the jury is to select from the conflicting inferences that which it considers most reasonable has been ignored. The Circuit Court of Appeals has taken from the record the mere fact that plaintiff used warm water and that her employer purchased a case of Surf and from these so-called facts without any other supporting evidence, has constructed inferences in opposition to that of plaintiff which inferences the Court then proceeded to denominate as equal to plaintiff's contention. In doing so the Circuit Court of Appeals has deprived plaintiff of the right to

have the fact questions of causation decided by a jury as provided in the Seventh Amendment to the Constitution of the United States. Therefore, the decision of the Circuit Court of Appeals for the Sixth Circuit, in sanctioning a search of the record for supposedly equal inferences and, upon finding such, holding that a verdict should be directed, constitutes a decision in conflict with applicable decisions of this Court and so far sanctions a departure from the usual and acceptable course of judicial procedure as to call for an exercise of this Court's power of supervision.

The decision in this case on the so-called equal inference rule is not an isolated decision by the Circuit Court of Appeals for the Sixth Circuit. In *General Motors Corporation v. Wolverine Insurance*, 255 F. 2d 8 (6th Cir. 1958), decided May 12, 1958, that Court applied the equal inference rule to reverse a judgment on a jury verdict and ordered the entry of judgment for the defendant.

CONCLUSION

Petitioner respectfully submits that this Court should grant a writ of certiorari to review this cause for the following reasons:

(1) The holding that state law controls in determining the sufficiency of the evidence in civil diversity actions presents a clear conflict of decisions between the Sixth Circuit on one hand and the Third, Fourth and Fifth Circuits on the other.

(2) That the question of whether or not the sufficiency of the evidence in diversity of citizenship action is controlled by state or federal law is a question which has not but should be decided by this Court.

(3) That under the evidence in this cause, the granting of a motion for directed verdict is contrary to the Seventh Amendment.

(4) That the equal inference rule as announced in this case and the previous *General Motors Case, supra*, is contrary to the applicable decisions of this Court.

(5) That the Circuit Court of Appeals in affirming the granting of a directed verdict by announcing an equal inference rule has so far sanctioned the departure from usual and accepted judicial procedure as to call for an exercise of this Court's power of supervision. As was said in *Jacob v. New York City*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment, a right so fundamental and sacred to the citizen whether guaranteed by the constitution or provided by statute should be jealously guarded by this court."

Respectfully submitted,

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Dated: January 6, 1959.

APPENDIX

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 13,467

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

Bernice Sheptur, *Appellant*, v. The Procter & Gamble Distributing Co., an Ohio corporation, *Appellee*.	Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

CAUSE ARGUED AND SUBMITTED

October 23, 1958—Before, Allen, Simons and Martin, Circuit Judges

This cause is argued by George L. Downing for appellant and by G. Cameron Buchanan for appellee and is submitted to the court.

JUDGMENT

(Filed November 28, 1958)

Appeal from the United States District Court for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

OPINION

Decided November 28, 1958

(Filed: November 28, 1958)

Before Allen, Chief Judge, Simons and Martin, Circuit Judges.

Per Curiam. The sole question presented in this appeal is whether the District Court committed reversible error in directing a verdict for defendant at the close of plaintiff's[1] testimony.

Plaintiff filed an action claiming that she had suffered an injury from the use of Tide, a well-known detergent. Plaintiff was employed as dishwasher at Cloverdale Farms, a restaurant in Garden City, Michigan. While plaintiff's testimony as to dates is somewhat vague, her employment began around April 26, 1952. The work required plaintiff

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[1] The parties will be designated as in the court below.

to wash dishes by hand in heated water for eight hours a day six days a week. The water was described as being water that she could put her hands in. Previously plaintiff had similar employment at a restaurant which used a dishwashing machine and therefore did not require frequent or continuous immersion of the hands.

It is admitted that during the first part of the employment plaintiff's employer furnished Tide for the dishwashing. On September 8, 1952, prior to plaintiff's leaving her employment, her employer purchased a case of Surf, another detergent, for use at Cloverdale. About September 24, 1952, plaintiff left her employment due to a severe skin irritation or eczema. She was treated for several weeks by two doctors and her condition improved so that she returned to Cloverdale just before election day. At plaintiff's request her employer supplied a different soap for several days and then reverted to Tide. Plaintiff used Tide "Just one day" and "quit right there" having worked in this second period one week.

After leaving the restaurant September 24, 1952, plaintiff was treated by three doctors, only one of whom testified at the trial. He stated that plaintiff's eczema was contact dermatitis. He did not testify that the use of Tide was any other soap or condition caused the irritation. The District Court directed the jury to return a verdict in favor of defendant upon the ground that sufficient evidence had not been presented to the effect that plaintiff's dermatitis was caused by Tide.

The only testimony on this point was given by plaintiff and a doctor who had never treated her as a patient.

As to plaintiff's testimony, when asked what the cause of the dermatitis was, plaintiff testified, "nothing else but Tide. That was all I was using." This statement was con-

cededly inaccurate for it is shown by undisputed testimony that some seventeen days before plaintiff left Cloverdale on September 24, 1952, Surf was furnished for use at the restaurant. Also she was shown to have used at home in dishwashing, laundry work, etc., preparations such as Lux, Camay, and Silver Dust.

Plaintiff's expert medical witness first saw and examined plaintiff on June 26, 1953. He stated that the eruption on plaintiff's hands could have been caused by Tide if that was the product that was used in her dishwashing.

We think the judgment of the District Court must be affirmed. A doctor's testimony to the effect that an alleged injury "could have been caused" in the manner claimed has little probative value. *Cole v. Simpson*, 299 Mich. 589, 595. Moreover, while lay witnesses such as plaintiff may testify as to what they observe and know, their testimony with reference to scientific facts requiring knowledge beyond that of the ordinary nonprofessional person has little evidential effect. *New York Life Insurance Company v. Newman*, 311 Mich. 368, 375. One does not have to be an expert as to what one sees and knows in order to give probative testimony. *DeGroot v. Winter*, 265 Mich. 274; *Austin v. Howard A. Davidson, Inc.*, 246 Mich. 599. Here, however, the question of the cause of the dermatitis involved scientific and medical facts beyond the knowledge or experience of plaintiff. *New York Life Insurance Company v. Newman, supra.* The instant case presented aspects upon which the testimony of an ordinary layman as to cause of the injury could shed little light. The fact that plaintiff was compelled to immerse her hands in heated water for eight hours a day six days a week was not to be ignored. Whether the water in which she had to immerse her hands so continuously was hard or soft, and whether it contained chemicals such as chlorine does not

appear, although doubtless these facts would have had bearing. A complex scientific problem was presented as to whether the dermatitis might not have been caused by the particular water and its use for such a continuous time. The fact that plaintiff was supplied with Surf for a substantial period before quitting the restaurant also was important.

It is to be observed that the court did not exclude this evidence. It was for the court to decide whether the evidence had sufficient probative force to present a jury question. The District Court rightly ruled, in view of plaintiff's lack of training or experience, that her evidence was not sufficient to require submission of the case to the jury.

The testimony of plaintiff's expert witness also fails to develop a prima facie case. He did not say that Tide was a more probable cause of the dermatitis than Surf or the other soaps and detergents admitted to have been used by plaintiff, nor that Tide was a more probable cause than the use of the heated water under the circumstances.

The rule upon this subject under Michigan law, which is controlling here, is thus stated in *Kaminski v. Grand Trunk Western Railroad Company*, 347 Mich. 417 at 421:

> "It is thus right to say that the trial judge's immediate duty, motion for direction having been made with address to the rule of conjectural choice between equally plausible inferences, is to determine on favorable view of the inference plaintiff relies upon whether it stands equiponderant at best with such as is, or are, urged by the defendant. If the answer is affirmative, then and only then will the judge be justified in proceeding as moved.
>
> "Some 30 years ago the supreme court of Alabama adopted a workable test-definition designed toward ascertainment of what is conjectural and

what is not in negligence cases. That court recently referred to such definition as having 'been quoted until it has become a classic' (*City of Bessemer v. Clowdus*, 261 Ala. 388, 394 [74 So. 2d 259]). We quote it as follows from the *Bessemer case:*

"'As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.'"

The scintilla rule does not obtain in Michigan. Under Michigan law, in order to make a prima facie case that requires submission to the jury, plaintiff's evidence must justify inferences that its contentions are at least equally as probable as those relied upon by defendant. *Kaminski v. Grand Trunk Western Railroad Company, supra; General Motors Corporation v. Wolverine Insurance Company*, 255 Fed. (2d) 8 (C. A. 6). The happening of an accident is not of itself any evidence of negligence. *Daigneau v. Young*, 349 Mich. 632. Here there were two, or three equally probable causes to account for plaintiff's condition. The probative evidence is not selective to any one of the possible causes. Cf. *Kaminski v. Grand Trunk Western Railroad Company, supra.* The jury is not warranted in speculating under this record that Tide was the proximate cause of the injury. *Frye v. City of Detroit*, 256 Mich. 466, 469. This case declares that the proof in such instances "must show more than a possibility."

All questions presented have been considered. We find no reversible error in the ruling of the District Court.

The judgment of the District Court is affirmed.

SECTION 750.33, MICH. COMP. LAWS 1948

"Any person, who with intent to sell, purchase or in anywise dispose of or acquire merchandise, securities, service or anything offered or sought by such person, directly or indirectly, to or from the public for sale, purchase or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto or any interest therein, makes, publishes, disseminates, circulates or places before the public, or causes directly or indirectly to be made, published, disseminated, circulated or placed before the public in this state, in a newspaper or by radio broadcast, or other mode of publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter or communication intended for a large number of persons, or in any other way, an advertisement of any sort regarding merchandise, securities, service or anything so offered to or sought from the public, or regarding the motive or purpose of a sale, purchase, distribution or acquisition which advertisement contains any assertion, representation or statement or illustration, including statements of present or former sale price or value, which is untrue, deceptive or misleading, or calculated to subject any person to disadvantage or injury through the publication of false or deceptive statements shall be guilty of a misdemeanor: Provided, however, That the provisions of this section shall not apply to any owner, publisher, printer, agent or employee of a newspaper or other publication, periodical or circular, who in good faith and without knowledge of the falsity or deceptive character thereof, publishes, causes to be published or takes part in the publication of such advertisement."

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No. 634

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1958 TERM

BERNICE SHEPTUR,
Petitioner,

v.

THE PROCTOR & GAMBLE DISTRIBUTING COMPANY,
an Ohio Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT

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REASONS FOR DENYING THE WRIT

I.

The Decision of the United States Court of Appeals for the Sixth Circuit Should Not be Reviewed Because Petitioner's Counsel Contended in the Trial and on Appeal That State Law Should Control the Determination of the Sufficiency of the Evidence to Present a Question of Fact for the Jury.

Petitioner asks this Court to review the decision of the Court of Appeals on the basis that the Court of Ap-

peals decided specifically that Michigan Law was controlling in determining the sufficiency of the evidence. Petitioner now claims that the Circuit Court of Appeals for the Sixth Circuit was wrong in so holding.

We respectfully refer this Honorable Court to the following taken from Petitioner's Brief and Appendix filed in the United States Court of Appeals for the Sixth Circuit:

> "It is, of course, clear that the sufficiency of the evidence is a matter of substantive law and is governed by state law. *Cooper vs. Brown*, 126 Fed. 2d, 874 (3rd Circuit, 1942); *Gulf M. & O.R. Co. vs. Fruend*, 183 Fed. 2d, 1005, 21 ALR 2d, 729, (8th Circuit, 1950)" (Pages 14-15 of Brief and Appendix for Appellant).

Petitioner is now estopped from claiming Federal Law rather than State Law should control when in both the trial and Appellant Courts, Petitioner took exactly the opposite position.

In *New York Elevated Railroad vs. Fifth National Bank*, 135 United States Reports, 432, in discussing a similar situation, this Honorable Court said at page 441 of the opinion:

> "But we are relieved from the necessity of laying down a general rule on the subject, because in this case it clearly appears that the defendant procured or acquiesced in the rulings under which the trial was conducted, and thereby waived the right to object to them. *Lahr vs. Metropolitan Elevated Railway*, 104 N.Y. 268, 294; *Drucker vs. Manhattan Railway*, 106 N.Y 157; *Hussner vs. Brooklyn Railroad*, 114 N.Y. 433; *Shaw vs. Stone*, 1 Cush. 228, 243."

Therefore, since Petitioner has contended until now that Michigan Law was controlling in determining the

sufficiency of the evidence, she should now be estopped from asking this Court to grant a Writ of Certiorari to review the matter.

II.

The Decision of the United States Court of Appeals, No Matter What Law Controls Should Not be Reviewed Because Petitioner Has Not Shown That She Was Prejudiced in Any Way.

Regardless of whether Michigan Law or Federal Law is controlling, the Petition for Writ of Certiorari should be denied because the Petitioner has not shown that she was prejudiced by the Trial Court's decision or the opinion of the Circuit Court of Appeals. There has been no showing that the Federal Rule in diversity cases would have helped Petitioner anymore than Michigan Law concerning the sufficiency of evidence to create a question of fact.

A decision of a Circuit Court of Appeals should not be reviewed by Writ of Certiorari unless substantial and prejudicial error appears in the record. This is true even though the Appellate Court assigns a wrong reason for a correct decision. *Sullivan vs. Iron Silver Mining Company*, 143 U.S. 431.

In discussing the propriety of a directed verdict in the case of *Patton vs. Texas and Pacific Railway Company*, 179 U.S. 658, this Honorable Court said at page 660:

> "Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting

questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party and he so rules by instructions to that effect, an Appellate Court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings in both courts, will rightfully be much influenced by their concurrent opinions."

In *Gillis, Administratrix of Gillis vs. New York, Haven & Hartford Railroad Company*, 249 U.S. Page 515, this Honorable Court said at page 516:

"That case repeated the established principle that that when the evidence justifies it, it is competent for a court to direct a verdict for defendant. The principle is not attacked by plaintiff. The contention, however, is that the courts below, one of which tried the case, were wrong in their estimate of the evidence and that plaintiff was entitled to the judgment of the jury upon it. We are unable to yield to the contention. Nor do we think it necessary to give a review of the evidence. It will be found in the opinion of the court and we have verified its correctness. The case turns, therefore, upon an appreciation of the testimony and admissible inferences therefrom, and even if the conclusions of the courts were more disputable we should have to refer to them. *Baltimore & Ohio R. R. Co. vs. Whitacre*, 242 U.S. 169; *Erie R. R. Co. vs. Welsh*, 242 U.S. 303."

Petitioner relies on cases under the Federal Employers Liability Act, which by inference she admits have no application to the present diversity of citizenship case.

Therefore, because Petitioner has failed to show any prejudice by the trial court's direction of verdict and the Sixth Circuit Court of Appeals' affirmance of the verdict, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Respondent respectfully submits that this Court should deny the Petition for Writ of Certiorari to review this cause for the following reasons:

1. That because Petitioner relied on State Law in the trial court and Circuit Court of Appeals in determining the sufficiency of evidence she is now estopped from claiming that Federal Law should apply.

2. That Petitioner has failed to show that she was prejudiced by the holdings of the trial court and the Circuit Court of Appeals.

3. That Petitioner has failed to show that the results would have been different if Federal Law had been applied.

Respectfully submitted,

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Dated: February 3, 1959.